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No. 982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PERRYTON WHOLESALE, INC., a Corporation,
Petitioner,

vs.

PIONEER DISTRIBUTING COMPANY OF KANSAS, INC., a Corporation,
Respondent.

REPLY BRIEF OF PETITIONER

WAYNE COULSON,
*DALE M. STUCKY,
1600 Wichita Plaza,
P. O. Box 997,
Wichita, Kansas 67201,
JACK M. ALLEN,
Perryton, Texas,
Attorneys for Petitioner.

*Counsel upon whom service is to be made.

R. L. MIDDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

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REPLY BRIEF OF PETITIONER

I

Treble Damages Not Allowable for Injury to Intrastate Commerce

The statement on page 5 of respondent's brief that petitioner restrained $122,066.56 of respondent's sales is both legally and factually incorrect. "There is no presumption in law or fact that a plaintiff would have made the sales the defendant made." *Obear-Nester Glass Co.* v. *United Drug Co.*, 8 Cir., 149 F.2d 671, 674. The only restraint of respondent's sales found by the court was $72,750, of which only $9,973 were interstate.[1]

1. P.R. 63-67; Interstate City Food, Walsh, Colo. $283, L & F, Lamar, Colo. $8,306, Springfield Co-op, Springfield, Colo. $1,-261, Walsh Food Market, Walsh, Colo. $123.

On page 5, respondent states, "Petitioner also ignores the district court's findings that Pioneer's interstate purchases, shipped to local Kansas retailers, were a part of Pioneer's interstate business."

The statement is not supported by any reference to the record.[2]

The fact is that there is no such finding. The trial court found and the Court of Appeals in its opinion refers to the fact that goods purchased by respondent from outside the state came to rest in respondent's Wichita, Kansas warehouse.[3] They had ceased to be in interstate commerce within the meaning of the Sherman Act.[4]

There was neither evidence nor finding that petitioner had interfered with respondent's interstate purchases in any way.

Chattanooga Foundry & P. Works v. *Atlanta*, 203 U.S. 390, cited on page 6 of respondent's brief was a restraint upon a purchase, not upon a sale. The opinion of the Circuit Court of Appeals in the same case, reported 6 Cir., 127 Fed. 23, clearly states that the contract was interstate and the shipments interstate.

Klor's v. *Broadway-Hale Stores*, 359 U.S. 207, also cited on page 6 involved restraint upon interstate purchases. No question of interstate commerce was raised or discussed.

The restraint involved in *Radiant Burners* v. *Peoples Gas L. & Coke Co.*, 364 U.S. 656, was a refusal to sell

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2. This is a violation of Rule 40(2).

3. Finding IV, ¶ 2, P.R. 18; Opinion of Court of Appeals, Petition for Certiorari, p. A. 6 and 353 F.2d 622.

4. *Bedford Cut Stone Co.* v. *Journeymen S.C. Assn.*, 274 U.S. 37; *Brosius* v. *Pepsi-Cola Co.*, 3 Cir., 155 F.2d 99; *Lawson* v. *Woodmere*, 4 Cir., 217 F.2d 148, 150; *United States* v. *Starlight Drivein, Inc.*, 7th Cir., 204 F.2d 419, 422.

natural gas shipped interstate for use in gas burners manufactured by plaintiff. No question of interstate commerce was involved. Like the *Klor's* case, the question involved was sufficiency of allegations of public injury.

Bigelow v. *RKO Pictures*, 327 U.S. 251, involved restraint upon interstate distribution of motion pictures. No question of interstate commerce was discussed.

In *United States* v. *Yellow Cab Co.*, 332 U.S. 218, the restraint was upon interstate purchases of taxicabs.

The restraint in *Apex Hosiery* v. *Leader*, 310 U.S. 469, was upon interstate sales.

The restraint in *North Texas Producers Association* v. *Young*, 5 Cir., 308 F.2d 235, was upon interstate purchases.

Union Carbide & Carbon Corporation v. *Nisley*, 10 Cir., 300 F.2d 561, involved a price fixing monopoly.

United States v. *Standard Oil Company*, 7 Cir., 316 F.2d 884, was a criminal case. A judgment of conviction was reversed as to one defendant for insufficiency of evidence to support the verdict and reversed as to other defendants on account of trial errors.

In *United States* v. *Gasoline Retailers Assn., Inc.*, 7 Cir., 285 F.2d 688, defendants in a criminal case enforced their conspiracy by cutting off deliveries of gasoline moving in interstate commerce. Acquiescence to the demands of the conspirators was made a condition of further deliveries of interstate gasoline.

The specific problem raised by the petition for certiorari is whether section 4 of the Clayton Act requires treble damages and attorney fees for injury to respondent's intrastate *sales* as a result of petitioner's unfair competition by reason of the fact that the same conduct

resulted in minor injury to respondent's interstate *sales*. The Court of Appeals answered squarely that it did, but cited no authority in support of its conclusion. (Petition A. 8; 353 F.2d 623)

On page 6 of its brief respondent has cited the cases above mentioned presumably in support of the conclusion of the Court of Appeals on this particular point. Five of the cases involve restraint upon interstate *purchases*. Two others involve restraint of interstate distribution of gasoline and natural gas to consumers and retailers. One involves criminal trial procedure and one involves restraint of interstate shipments by a labor union.

None of the cases has any bearing, whatsoever, upon the question of whether treble damage and attorney fees are allowable for injury to intrastate sales by unfair competition.

II

Respondent's Exclusive Dealing Contracts Were Unreasonable Restraints upon Petitioner's Interstate Competition Without Regard to Amount of Commerce Restrained

Respondent's present interpretation of its exclusive dealing contract (Brief 8) comes too late.

Prior to the filing of this suit respondent interpreted it as an exclusive dealing contract and by threatening the Mammel chain with suit for breach of the contract managed to retain Mammel as a customer after Mammel had agreed to purchase from petitioner. (P.R. 147, 279, 285, 316)

The contention presently advanced by petitioner was briefed and orally argued in both the trial court and the Court of Appeals. The Federal Rules require only that

a pleading contain "(2) a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a) Petitioner pleaded that respondent was a monopolist and that the exclusive dealing contract was a violation of sections 1 and 2 of the Sherman Act. (R.R. 11-12) It was not incumbent upon petitioner to plead either a legal or a factual argument as to why the contract violated the Sherman Act.

The Kansas cases cited on page 9 of the brief involved requirements contracts, not exclusive dealing contracts.

CONCLUSION

We respectfully submit that the petition for certiorari raises questions which merit review by this Court.

WAYNE COULSON,
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P. O. Box 997,
Wichita, Kansas 67201,
JACK M. ALLEN,
Perryton, Texas,
Attorneys for Petitioner.